IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

JOHN M. FLOYD & ASSOC., INC.,	)	Civil Action No. 5:02CV00101
	)	
Plaintiff,	)	
	)	
v.	)	MEMORANDUM OPINION
	)	
FIRST BANK,	)	
	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

Before the court are the parties' cross motions for summary judgment. On July 15, 2004, U.S. Magistrate Judge B. Waugh Crigler recommended that this court grant the plaintiff's motion for summary judgement, to the extent that it seeks a judgment as a matter of law that there was a contract between the parties, but deny the plaintiff's motion in all other respects. In addition, the magistrate judge recommended that this court deny the defendant's motion for summary judgment in its entirety. After a thorough examination of the magistrate judge's report and recommendation, the defendant's objections and the plaintiff's response thereto, the supporting memoranda and the applicable law, this court adopts the analysis and findings of the magistrate judge. Finally, because the plaintiff has no objection to the court granting the defendant's motion for summary judgment on the plaintiff's claim that the defendant breached the contract by disclosing confidential information, the court grants summary judgment in favor of the defendant on this claim.

I. FACTS

The plaintiff, John M. Floyd & Associates ("Floyd") is a Texas corporation that markets and sells its Overdraft Privilege Program (ODP) to financial institutions. Floyd's ODP is designed to increase the amount of income that banks can collect from customers who overdraw their checking accounts. The defendant, First Bank, is a bank that was interested in purchasing Floyd's ODP to increase its revenue. After a de novo review of the evidence in this case, this court agrees with the factual recitation of the Magistrate Judge in his July 15, 2004 Report. The court, however, will briefly recount the facts in this opinion.

In 2001, First Bank began investigating various overdraft programs offered by several different companies after deciding that installing such a program would be profitable for the bank. Stephen Pettit, Senior Vice President and Comptroller of First Bank, was assigned to study these programs and make a recommendation to the Bank about which vendor to select. In 2001 and early 2002, three vendors, including Floyd, Bill Strunk & Associates, and Pinnacle, each made a presentation to the Bank's Executive Committee about their respective overdraft programs. Pettit recommended that the Bank select Floyd's program, a decision which the Bank's Executive Committee approved. Pettit then telephoned Richard Miller, an Executive Director at Floyd, telling him that the Bank had accepted Floyd's proposal. Floyd then sent the defendant a letter proposal dated March 7, 2002, outlining the terms of the defendant's engagement with Floyd. Plaintiff's Brief, Ex. K (hereinafter "letter proposal"). First Bank never signed the letter proposal.

The March 7, 2002 letter proposal states that Floyd's "objective" is to install its ODP program in First Bank. The letter states that the cost of the project will be "one-fourth of the first year's quantified net pre-tax increase in NSF and overdraft income, plus out-of-pocket expenses." Recommendations by Floyd that are "installed or approved or approved as modified" by First Bank would be included in the fee calculation. The letter requires that First Bank pay a $20,000 "fully refundable retainer" at the start of the engagement. It also states that First Bank's monthly bills will be applied against the retainer first before they are required to make the remaining payments. Finally, the letter provided for confidentiality on the part of both parties and restrained Floyd from marketing its program to banks with $500 million dollars or less in assets located in the Northern Shenandoah Valley of Virginia.

On March 18, 2002, Floyd employees Gina Ellis and Jean Rube ("the Site Team") arrived at First Bank to begin the installation process. The Site Team presented an invoice of $20,000 to First Bank. First Bank promptly wired the money to Floyd so that the Site Team could begin working at First Bank. During the Site Team's first presentation to bank employees, First Bank's Director of Technology, Sara Orndorff, asked whether the program would allow a customer's balance associated with the ODP to be available at all delivery channels of the bank. Ellis was not sure about the answer to that question at that time.

Following this conversation, Orndorff was told by Jack Henry & Associates, First Bank's core processing system provider, that they could not provide an interface for Floyd's ODP program. Floyd's site team, however, continued to make presentations and

preparations at First Bank in preparation for the ODP installation. At the end of the week, First Bank's President, Harry Smith, asked the Site Team not to return to First Bank the following week as originally planned. By a letter dated April 24, 2002, First Bank informed Floyd that it had decided not to pursue Floyd's ODP program and, relying on the terms of Floyd's March 7, 2002 proposal letter, First Bank requested a refund of its $20,000 retainer.

On July 11, 2002, First Bank contracted with Pinnacle, one of Floyd's competitors, to install an overdraft protection program that served basically the same purpose as the plaintiff's program. Pinnacle's program was installed in September 2002.

II. PROCEDURAL POSTURE

On October 15, 2002, the plaintiff instituted this action asserting a breach of contract claim against the defendant. The plaintiff argues that First Bank had an enforceable contract with Floyd and that First Bank breached that contract when it asked Floyd to stop the installation process of its ODP. Floyd further claims that First Bank's later installation of Pinnacle's overdraft program constituted a "modification" of Floyd's recommendation to First Bank to install its ODP. Based on this reasoning, Floyd claims that it is entitled to damages in the amount of 25% of First Bank's increase in overdraft and NSF income as a result of installing its competitor's program.

In response, the defendant filed a motion for summary judgment asking the court to find, as a matter of law, that no contract was ever formed. Moreover, the defendant argues

that even if a contract existed, there was no breach because First Bank was free to reject any recommendations made by Floyd under the terms of the alleged contract. Second, the defendant seeks summary judgement on its counterclaim, asserting that it is entitled to the return of the "fully refundable" $20,000 retainer that it advanced to the plaintiff. Third, the defendant argues that even if a contract existed, it was not signed by First Bank and it could not have been performed within a year, so plaintiff's action is barred under the Statute of Frauds, Va. Code Ann. § 11-2(8) (2004).

On November 5, 2002, this matter was referred to Magistrate Judge Crigler for his report and recommendation, which he filed on July 15, 2004 ("Report"). In the Report, he recommended that the court grant the plaintiff's motion for summary judgement, to the extent that it seeks a judgment as a matter of law that there was a contract between the parties, but deny the plaintiff's motion in all other respects and deny the defendant's motion for summary judgment in its entirety. The defendant has filed timely objections to the Report, and the plaintiff has filed a response to those objections.

III. STANDARD OF REVIEW

A party is entitled to summary judgment when the pleadings and discovery show that there are no genuine issues as to any material fact, and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[S]ummary judgment ... is mandated where the facts and the law will reasonably support only one conclusion." *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279

(4th Cir. 2000) (quoting *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)). If the evidence is such that a reasonable jury could return a verdict in favor of the non-moving party, then there are genuine issues of material fact. *See Anderson*, 477 U.S. at 248. All facts and inferences shall be drawn in the light most favorable to the non-moving party. *See Food Lion, Inc. v. S.L. Nusbaum Ins. Agency, Inc.*, 202 F.3d 223, 227 (4th Cir. 2000).

IV. DISCUSSION

A. A Contract was Formed

The plaintiff argues that First Bank had an enforceable contract with Floyd and that First Bank breached that contract when it asked Floyd to stop the installation process of its ODP program. First Bank asserts that no contract was ever formed between the parties. The three essential elements of a contract are: (1) an offer, (2) acceptance, and (3) consideration. *See Montagna v. Holiday Inns, Inc.*, 221 Va. 336, 346 (1980). The Magistrate Judge found, and this court agrees, that all three elements were present in this case.

The plaintiff, Floyd, communicated an offer of its overdraft program services to First Bank on several occasions. Most significantly, Floyd communicated its final offer to First Bank in its letter to First Bank's CEO, Harry Smith, dated March 7, 2002. The letter from Floyd to First Bank stated "I am submitting this letter as a proposal for the engagement of our firm by First Bank...." This offer letter went on to describe the price that would be charged for Floyd's ODP, the method of payment, and other products that

Floyd would offer to First Bank during the course of the engagement. First Bank disputes that there was ever an "offer" because it asserts that the letter proposal left many matters open for negotiation, namely which recommendations were to be approved or declined by First Bank. While it is true that First Bank never accepted other recommendations discussed in the proposal letter, it did accept the primary proposal made by Floyd – to install Floyd's ODP program in First Bank. The letter clearly stated, "Our objective is to install our Overdraft Privilege Program in First Bank."

First Bank, through its Senior Vice President Stephen Pettit, accepted the offer to install Floyd's ODP over the telephone. (Pettit Deposition 66, 70). Pettit stated in his deposition that he spoke with Richard Miller, a salesman with Floyd, and told him that First Bank's Executive Committee had met and that it had decided to go forward with the John Floyd program. (Pettit 66). Although First Bank disputes that Pettit conveyed acceptance of the proposal to Miller, this court finds that Pettit's testimony clearly shows that, on behalf of the bank, he intended to and in fact did convey acceptance of Floyd's proposal to Miller.

First Bank disputes that there was acceptance because it alleges that there was no meeting of the minds on every material term of the agreement. However, there was a meeting of the minds on every material term regarding the installation of the ODP itself – the product to be provided and the payment method and price for that product were agreed upon. It is true that the parties did not agree upon what other recommendations would be approved and installed, like which marketing tools First Bank wanted to purchase.

However, these extra products that Floyd was offering First Bank were not part of the original contract that was accepted by First Bank. Finally, as the Magistrate Judge correctly pointed out, "That the parties now dispute the definition of a single term 'modified' does not impact whether an enforceable contract was formed." Report and Recommendation 9; see *Galloway Corp. v. S.B. Ballard Constr. Co.*, 464 S.E.2d 349, 354 (1995) ("The mere fact that terms of a contract are in dispute is not evidence that the language is not clear and explicit....")

First Bank also argues that the parties' minds did not meet on whether the letter proposal constituted a "recommendation," within the meaning of the parties' agreement, that would obligate First Bank. The letter proposal only obligated First Bank, when it accepted the central objective of the proposal, to install Floyd's ODP. On this point – agreement to install Floyd's ODP – the evidence described above shows that the parties' minds did meet.

Finally, this contract was supported by valid consideration. First Bank wired $20,000 in earnest money to Floyd and, in return, the Floyd site team began the installation process at First Bank by making presentations to First Bank employees about the ODP. In fact, the evidence shows that the site team would not begin work at First Bank until the earnest money was wired to Floyd. (Pettit 93.) In addition, pursuant to the contract, Floyd halted marketing its program to other banks in the Northern Shenandoah Valley.

First Bank also argues that no contract was formed between the parties because the letter proposal constituted an unenforceable agreement to agree. See *W.J. Schafer Assoc.*,

Inc. v. Cordant, Inc., 493 S.E.2d 512, 515 (Va. 1997); *Allen v. Aetna Cas. Ins. and Sur. Co.*, 222 Va. 361, 363-64, 281 S.E.2d 818, 819-20 (Va. 1981). "In considering whether an agreement is an enforceable contract or merely an agreement to agree, courts consider not only whether the document at issue includes the requisite essential terms, but also whether the conduct of the parties and the surrounding circumstances evince the parties' intent to enter into a contract." *EG&G, Inc. v. Cube Corp.*, 63 Va. Cir. 634, 646 (Va. Cir. Ct. 2002) (*citing High Knob v. Allen*, 138 S.E.2d 49 (Va. 1964)). In this case, the conduct of the parties – namely the offer made by Floyd in the proposal letter, Pettit's phone call to Miller conveying acceptance of the offer, the consideration paid by First Bank in return for Floyd's site team to begin work at the bank, and the partial performance of the site team – show that the parties intended to enter into a contract and not merely an agreement to agree.

In addition, the court agrees with the Magistrate's conclusion that enforcement of this agreement is not barred by the statute of frauds. Although First Bank never signed the original March 7, 2002 proposal letter, First Bank, in a letter dated April 24, 2002, sought to enforce the provisions of the March 7, 2002 letter. As the Magistrate concluded, "Such an express reference in writing, signed by the party to be charged, essentially incorporating the unsigned writing alleged to be the basis of the parties' contract, satisfies the statute of frauds." Report and Recommendation 10; *see also Hewitt v. Hutter*, 406 F. Supp. 976, 981-82 (W.D. Va. 1975).

This court finds that a contract was formed between the plaintiff and the defendant,

as a matter of law, because an offer was made, First Bank accepted that offer, and both parties put forth valid consideration in support of the contract. In addition, enforcement of this contract is not barred by the statute of frauds.

B. The Breach of the Contract

This court finds, after a de novo review of the evidence, that there are genuine issues of material fact concerning whether First Bank breached the contract. The parties dispute whether Richard Miller, in his October 19, 2001 presentation, represented to First Bank that the overdraft privilege balance would be available at all of the bank's delivery systems. (Pettit 18, 112; Ellis 154-64; Miller 157-58). Moreover, Orndorff alleges that a representative at Jack Henry (the company that provided First Bank with its core processing program) informed her that it did not have an interface that would allow overdraft balances from Floyd's program to be reflected in the bank's system. (Orndorff 40-41). However, other evidence shows that Jack Henry eventually agreed to supply an interface to First Bank for the Floyd program that would have solved these problems. (Pettit 148-150; Floyd 203-204). The court finds that there are genuine issues of material fact about whether this solution would have allowed the customers' balances to be available at all delivery channels at the bank and allow the system to work as First Bank contends that Floyd promised it would. Therefore, this court finds that the plaintiff's motion for summary judgement on all matters related to whether the defendant breached the parties' agreement is denied.

First Bank argues that even if a contract had existed between the two parties, under the terms of the contract, it had the ability to decline any recommendations made by Floyd

including whether to install Floyd's ODP, and so First Bank could not have breached the contract. First Bank alleges that Floyd had not yet made any recommendations to First Bank and that the parties were still in the study or analysis phase and had not yet entered into the presentation of recommendations phase. This assertion, however, is contradicted by the facts. As described above, First Bank accepted Floyd's proposal to install its ODP program when Pettit called Miller to tell him that First Bank wanted to hire Floyd to install its ODP, and when First Bank paid the retainer to Floyd so that it could start working. At that point, First Bank lost its right to decline installation of that program without breaching the parties' contract. Floyd described the situation well in its response to First Bank's objections – Floyd compared this contract with a contract to build a house. In a contract to build a house, the parties agree that the builder will build the house, but they still have to work out the details of what the house will look like and how it will be constructed. By comparison, "[t]he fact that Floyd would conduct an on-site analysis and make additional recommendations to First Bank about operational aspects of the program with the goal of maximizing the profitability of the program does not make its contract with First Bank unenforceable." Plaintiff's Response to Defendant's Objections 5. Floyd points out that the ODP still could have been installed and would have been profitable, even if First Bank failed to act on any of Floyd's additional recommendations. In short, this court finds that First Bank entered into a contract to install Floyd's ODP and that it was only the subsequent recommendations relating to marketing and other operational issues to which First Bank never agreed.

Finally, First Bank also argues that the Magistrate violated the principle of contract construction to give all parts of a contract meaning because his reading of the contract eliminates First Bank's power to decline recommendations. *See Winn v. Aleda Constr. Co.*, 315 S.E.2d 193, 195 (Va. 1984). This statement, however, is inaccurate because First Bank was still free to decline any additional recommendations made by Floyd about how best to deal with marketing or other operational issues related to Floyd's program.

D. Installing a Competitor's Program is not a Modification of Floyd's ODP

Floyd argues that First Bank's installation of the Pinnacle program is simply a "modification" of its recommendation to install overdraft protection, and so it should be paid the full amount that it was owed under the March 7, 2002 contract. This court finds that Floyd recommended that its own program be installed at First Bank. As the March 7, 2002 letter stated, "Our objective is to install *our* Overdraft Privilege Program in First Bank." It is nonsensical to conclude that installation of a competing vendor's program was a modification of Floyd's recommendation to install its own program. As the Magistrate points out, "modification" has a standard dictionary definition of "as small alteration, adjustment or limitation." Webster's II New Riverside University Dictionary (1988). Installing a competitor's program is certainly not an alteration of the plaintiff's product, but rather a complete replacement of the plaintiff's product. Therefore, the fact that First Bank installed a competitor's product, as a matter of law, is not a "modification" of Floyd's recommendation to install its own program. However, the increase in revenue that First Bank experienced as a result of installing Pinnacle's program is relevant to a determination

of how much revenue could be gained from such a program from which damages could be calculated.

E. Defendant's Counterclaim

First Bank argues that the $20,000 that it paid to Floyd as a retainer should be refunded to First Bank since it never installed Floyd's program. Floyd contends that it must be applied toward the total fee that First Bank owes to Floyd and so it cannot be refunded. The determination of whether First Bank is entitled to a return of this retainer is dependent upon the issue of whether First Bank breached the parties' agreement and the amount of damages that may have resulted. Because there are genuine issues of material fact concerning whether the defendant breached the agreement, there are also material issues of fact about whether First Bank is entitled to a refund of the retainer.

First Bank contends that the Magistrate erred by denying First Bank's Motion for summary judgment on this issue because the magistrate relied on a ground not pleaded by Floyd – namely that the $20,000 should not be refunded until the question of whether First Bank breached the contract was resolved. Floyd, however, did plead that First Bank breached the contract. Therefore this court agrees that it is both proper and logical to conclude that First Bank is not entitled to the return of its $20,000 deposit until the question of whether First Bank breached the contract is resolved.

In addition, First Bank makes a number of arguments supporting its primary point that it is entitled to a refund of its retainer because the Floyd ODP was never installed. These arguments, however, do not address the fact that First Bank may not be entitled to a

refund of its $20,000 retainer if it is found by the trier of fact that it breached its contract with Floyd. If the trier finds that First Bank breached the contract, then Floyd is entitled to damages, which may exceed $20,000.

F. Floyd's Misappropriation of Trade Secrets Claim

First Bank argues that the Magistrate Judge should have entered summary judgment in favor of First Bank on Floyd's misappropriation of trade secrets claim. Floyd claims in its complaint that First Bank breached the letter proposal by disclosing Floyd's confidential information to third parties. In its response to the defendant's objections, Floyd stated that it had no objection to the court granting First Bank's motion for summary judgment on this issue. Plaintiff's Response at 2, n.1. Therefore, this court grants First Bank's motion for summary judgment on the misappropriation of trade secrets claim.

The Clerk of the Court hereby is directed to send a certified copy of this Memorandum Opinion to all counsel of record and to Magistrate Judge Crigler.

ENTERED:

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Senior United States District Judge

_____

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

JOHN M. FLOYD & ASSOC., INC.,	)	Civil Action No. 5:02CV00101
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
FIRST BANK,	)	
	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED, ORDERED, AND DECREED

as follows:

1. The defendant's objections to the Report and Recommendation, filed August 10, 2004, shall be, and they hereby are, OVERRULED.

2. The magistrate judge's Report and Recommendation, filed July 15, 2004, shall be, and it hereby is, ADOPTED.

3. The plaintiff's motion for summary judgment, filed May 7, 2004, shall be, and hereby is, GRANTED to the extent that it seeks a judgment as matter of law that there was a contract between the parties, but the plaintiff's motion is DENIED in all other respects.

4. The defendant's motion for summary judgment, filed May 7, 2004, is GRANTED to the extent that it seeks summary judgment on the plaintiff's misappropriation of trade secrets claim. The court also concludes that, as a matter of law, installing Pinnacle's program

cannot constitute a "modification" of the Floyd ODP within the meaning of the alleged contract. The defendant's motion is DENIED in all other respects.

The Clerk of the Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to Magistrate Judge Crigler and to all counsel of record.

ENTERED:

_____

Senior United States District Judge

_____

Date